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No. 115

In the Supreme Court of the United States

OCTOBER TERM, 1957

TENNESSEE BURLEY TOBACCO GROWERS' ASSOCIATION, ET AL., PETITIONERS

v.

IVAN RANGE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF TENNESSEE

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
Department of Justice,
Washington 25, D. C.

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In their reply memorandum, petitioners reiterate their contention that, at the time the contracts between the Commodity Credit Corporation and the Association were entered into, there existed a settled administrative construction of the term "distributed" which permitted distribution of net gains on loan-support crops to be made by an assignment of equities on the books of the Association, rather than by direct cash payments. Petitioners also assert that the Government's memorandum in opposition gives a misleading impression of the settled administrative practice by failing to advise this Court of its existence (R. Mem. 2, 4).

We wish to restate, as set forth in our original memorandum (pp. 3, 6–8) and as found by the court below (Pet. App. 18, 21–22), that the Commodity Credit Corporation made no official ruling that non-cash distributions might be made without specific approval and that there was no settled administrative practice which would justify such a distribution in the absence of approval.[1] Petitioners' reliance on expert testimony of two former officials of the Department of Agriculture as supporting the contrary conclusion is misplaced. This testimony represents, and can represent, no more than the personal views of those officials as to what a proper interpretation of the contested contract provision should be. It does not, and cannot, represent a formal and official government policy. At least in part, the desire of the Commodity Credit Corporation to avoid an official ruling was due to a then unresolved conflict among various members of the Department of Agriculture as to what the correct ruling should be. The testimony of Mr. Loos and Dr. Davis is simply typical of one school of thought on that question.

We have reprinted as an appendix to this supplemental memorandum the text of two letters, on file in the Department of Agriculture, to counsel for petitioners and to the president of the Association which demonstrate, as petitioners must have known, that the

[1] We stated in our original memorandum, p. 6, that we had been advised by Commodity Credit Corporation that the 1957 regulations would require cash distribution. These regulations have since been published in the Federal Register and require that net gains be so distributed unless government approval is obtained. 22 Fed. Reg. 4777, 4778 (§ 464.906 (b)).

Department of Agriculture disapproved the making of non-cash distributions without prior authorization from the Government. These are being made available to the Court in view of petitioners' assertion that the Government's memorandum created a misleading impression. The first letter, signed by the Secretary of Agriculture and addressed to counsel for petitioners, states that, "[e]xcept for the Tennessee Burley Tobacco Growers Association, all of the cooperatives participating in the price support program have distributed in cash to growers all of their net gains except for small amounts retained as reserves with the approval of Commodity Credit Corporation." (App., *infra*, p. 8). It further states that retention of net gains "for the purpose of financing and promoting competitive facilities not essential to the operation of the program is not in the public interest." (*ibid.*). And petitioners were reminded that they had been informed as early as June, 1953, that the Department disapproved the Association's engaging in such competitive operations and at the same time continuing to act as a price-support agency (App., *infra*, pp. 8–9).

The second letter, from the Executive Vice President of Commodity Credit Corporation to the Association's president, informed petitioners that the Government accepted the decision of the Court of Appeals of Tennessee requiring cash distribution and that the request for allocation of net gains, other than for a reserve for operating contingencies, was disapproved (App., *infra*, pp. 9–10). The letter referred to the fact that in 1951 the Association had successfully

sought approval of a request to retain approximately one-half of the 1946 crop net gains as an allocated reserve and that other associations had similarly obtained government approval for the creation of necessary reserves (*ibid.*). It is thus apparent that petitioners were aware of the fact that Commodity Credit Corporation had never taken an official position that "no formal ruling was necessary to authorize what petitioners did and what the court below (and now the Solicitor General) say they should not have done." (R. Mem. 2).

The only written expression of a Department of Agriculture policy conforms with the decision of the Court of Appeals of Tennessee. For this reason, and the reasons given in our original memorandum, it is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.

SEPTEMBER, 1957.

DECEMBER 3, 1956

Hon. NORMAN M. LITTELL,
Attorney at Law
1824–26 Jefferson Place, N.W.
Washington 5, D. C.

DEAR MR. LITTELL: This is in response to your letter of November 23, 1956. The question of the selection of an agency or agencies through which the Commodity Credit Corporation will function in bringing price support to producers is not a matter requiring formal administrative hearings with findings of fact. Nonetheless, I personally listened to your presentation and gave consideration to the matter. You were promptly informed of the decision reached.

The incident of withholding loan tobacco from sale in December 1955, which you mentioned in your letter, is not a matter at issue. In this connection, however, it should be noted that the question raised at that time by representatives of this Department related to the right of the Association, under the terms of the loan agreement, to withdraw tobacco from sale without consultation with representatives of the Department. In the letter of December 12, 1955, to which you refer, Mr. Miller made clear that he was not insistent that the tobacco be sold at the previously established prices but that the Association should submit any recommendations it cared to make regarding increases in the prices for the tobacco. As it developed, the Association did sell a considerable quantity of tobacco at approved higher prices. We are glad that this was possible, and we hope that this will be reflected in net

gains of the Association in which growers will directly share. We do recall, however, a prior occasion when the Association declined to sell 1950 crop tobacco at prices which were acceptable to Commodity Credit Corporation and at which other Associations were making sales, with the result that the Tennessee Burley Tobacco Growers Association ultimately disposed of the tobacco at substantially less than could have been obtained.

As you undoubtedly are aware, when the Commodity Credit Corporation first undertook to utilize the services and facilities of the Tennessee Burley Tobacco Growers Association to bring price support to Burley producers in Tennessee, the Association did not own or operate any storage or redrying facility and had only negligible cash assets acquired from a small membership fee of a few thousand producers. Since the only way Burley producers could receive price support in Tennessee was through this Association and by becoming members thereof, extreme care was essential that this monopolistic power was not abused. For this and other reasons, the contracts between the Commodity Credit Corporation and the Association provided that neither the Association nor any subsidiary thereof, without the written consent of the Commodity Credit Corporation, shall engage in tobacco activities other than in connection with tobacco received under price support and that it would distribute any net gains from its operations to the producers.

A small membership fee was permitted to be collected by the Association from all growers (more than 75,000) seeking price support through this program and the Association was permitted up through 1951 to collect a levy upon all of the Burley tobacco sold through the auction markets in Tennessee and subsequent to that time on price support tobacco moving

through the Association. This levy has been insufficient in itself to cover all of the administrative expenses and other costs of the Association in the handling of the tobacco under the price support program. The Commodity Credit Corporation, therefore, made nonrecourse loans to the Association in an amount not only to cover the price support levels advanced to the producers but also to cover administrative and operational costs incurred by the Association under the price support program which were in excess of such levies.

This Association regrettably soon became high-cost in its operations. In fact, the cost per unit of volume of tobacco handled has been the highest of all the Associations operating in other areas or in connection with other types of tobacco. This, in itself, resulted in an unnecessary risk being borne by the Commodity Credit Corporation which underwrites all losses and does not share in any "net gains" from year to year. Further, it tended to defeat the purposes of the program by reducing the amount of any net gains which might be available to the producers.

It is to be borne in mind that the storage and redrying facilities, as operated by the Association and its subsidiary, charges the price support program the going rates for its services. None of the profits derived therefrom reduces the cost of the price support program. Despite the fact that these activities are separate functions, the Association has endeavored to charge all of its administrative expenses to the price support program underwritten by the Commodity Credit Corporation. We have found no practical way for the Government to assure itself from audit reports or otherwise what portion of administrative expenses should have been charged to operations other than those directly related to the price support program.

If the Association, as you have analysed its income and expenditures, has not utilized any of the "net gains" in the construction of the warehouses and the redrying facilities, we are at a loss to understand why it has not made a cash distribution of such net gains and why it finds it necessary to continue expensive litigation with a portion of its membership with respect to such net gains. We call to your attention that the Association has not responded to the letter of this Department of October 13, 1955, wherein we stated we would be unwilling to approve retention by the Association of all of the net gains resulting from the 1947–1949 crops but would give consideration to a request for approval of the use of a limited portion of the net gains for the establishment of a reasonable reserve to meet operating contingencies.

Except for the Tennessee Burley Tobacco Growers Association, all of the cooperatives participating in the price support program have distributed in cash to growers all of their net gains except for small amounts retained as reserves with the approval of Commodity Credit Corporation.

In view of the unique position occupied by the various cooperative associations which are utilized by the Government in extending price support on tobacco, the use by any such association of "net gains" derived from the tobacco price support operation or levies assessed through the powers it exercised under the program for the purpose of financing and promoting competitive facilities not essential to the operation of the program is not in the public interest.

I understand that as long ago as June 1953, the Board of Directors of the Association was informed that, while this Department as a matter of long-standing policy looked with favor upon and supported the development of farmer cooperatives on a sound basis,

including cooperatives which might engage in storage, redrying, and marketing of tobacco, the Department could not look with favor upon the Tennessee Burley Tobacco Growers Association operating both as a price support agency and as a warehouseman and redryer and that it should, therefore, elect which field it wished to pursue. We believe the Association has had time to get its house in order and to choose the course it desires to follow.

Sincerely yours,

/s/ E. T. BENSON
Secretary.

DEPARTMENT OF AGRICULTURE,
Washington 25, D. C., October 13, 1955.

Mr. F. V. BROWDER, President
Tennessee Burley Tobacco Growers Assn.
Box 390
Greeneville, Tennessee

DEAR MR. BROWDER: This is in reply to your letter of August 31, 1955, concerning the disposition of the net gains which accrued from the sale of 1946, 1947, 1948, and 1949 crop tobacco pledged to Commodity Credit Corporation as collateral for loans.

The loan agreements between Commodity Credit Corporation and the Association provided in effect that all net gains accruing from the sale of tobacco upon which CCC has loaned funds shall be distributed on a fair and equitable basis to growers by the Association unless a disposition of such gains other than by distribution to growers is requested by the Association and approved by Commodity Credit Corporation. This contract provision has been included in tobacco loan agreements for many years.

With respect to the net gains for the years 1946 to 1953, inclusive, the Court of Appeals for Tennessee,

Eastern Section in *Ivan Runge et al.* v. *Tennessee Burley Tobacco Growers Association et al.*, interpreted this contract provision as giving producers a right to a cash distribution unless the Commodity Credit Corporation or the Secretary of Agriculture authorizes other disposition such as distribution by means of an allocation of equities rather than payment in cash. The Commodity Credit Corporation accepts the court's interpretation of the contract provision.

In May 1951, the Association sought approval of Commodity Credit Corporation of a proposal to pay approximately one-half of the 1946 crop net gains to the participating growers and to retain as an allocated reserve the other one-half of the net gains. On June 1, 1951, Commodity Credit Corporation approved this proposal of the Association. We assume that the court's decree does not affect any reserves established pursuant to that approval.

Similar to the approval granted to your Association in 1951, this Department has, in the past, approved applications of other associations operating under the same form of agreement in other areas for a retention of a portion of a given year's net gains for the purpose of creating necessary reserves.

Commodity Credit Corporation believes that, under all the circumstances involved, it would not be warranted in approving your allocation of all net gains. However, the Corporation would give consideration to a request for approval of the use of a limited portion of the net gains for the establishment of a reasonable reserve to meet operating contingencies.

Sincerely yours,

s/ EARL M. HUGHES,
Executive Vice President.

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